(2)

No. 86-1689

In the Supreme Court of the United States

OCTOBER TERM, 1986

KIN SUN YUEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

9 pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1689

KIN SUN YUEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court admitted extrinsic offense evidence under Fed. R. Evid. 404(b) for an improper purpose.[1]

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of committing extortion and conspiring to do so, in violation of 18 U.S.C. 1951, and using firearms in the commission of a felony, in violation of 18 U.S.C. 924. He was sentenced to consecutive 20-year terms of imprisonment on the conspiracy and substantive extortion counts and to a consecutive 10-year term of imprisonment on the firearms count.

---

[1]The judgment of the court of appeals was entered on December 31, 1986. The petition for a writ of certiorari was filed on April 20, 1987, and is therefore substantially out of time under Rule 20.1 of the Rules of this Court.

Petitioner's convictions resulted from his participation in a scheme to extort money from a wealthy Ft. Lauderdale family. In September 1983, petitioner met with three men at the Ft. Lauderdale airport by prearrangement. While staying at a local motel, the four conducted surveillance, over the next two days, of the home and Chinese restaurant belonging to the Lee family. On the night of September 6, 1983, petitioner drove his three co-conspirators to the Lee home. They waited there until shortly after midnight, when Winston and May Lee returned for the evening. Two of petitioner's cohorts then forced the Lees out of their car and into the house at gunpoint. Moments later, they radioed a third member of the group to join them inside. One of the men then telephoned someone and gave that person the telephone number for the Lee home (4 R. 163-164, 168; 5 R. 331-333). Petitioner was not one of the three men inside the home.

Throughout the night, the three men made and received several telephone calls. They also referred to Winston Lee as "Kow Sook," a term of familiarity meaning "uncle," and on one occasion that night when Lee answered the telephone, the person on the other end said "Kow Sook, I don't want to talk to you." One of the men in the house later asked Lee whether he still employed one Lo Gon Ki, the manager of Lee's restaurant, who had been a good friend of petitioner's when petitioner also worked at the restaurant (3 R. 47; 4 R. 130-132; 5 R. 334-337; 6 R. 354).

After taking what little cash and jewelry they could find in the house, the three men demanded $200,000 from the Lees, who agreed to visit their bank the next day in an effort to secure that sum. The following morning, the Lees' daughter Ella, accompanied by one of the three men, visited the bank. When they found no cash in the family's safe deposit box, Ella was forced to withdraw $4,000 from the family checking account, which was most of the money in the

account at that time. In addition, Winston Lee agreed to pay the men $3,000 per week, an arrangement that the men accepted after a series of telephone calls. The men then took Winston Lee's car and left the house. They later met petitioner at a local bowling alley, where they left Lee's car. All four then departed in petitioner's car (4 R. 115-127; 5 R. 193; 6 R. 343, 345, 352-353).

Because petitioner was never inside the Lees' home, the victims were unable to identify him as the fourth member of the conspiracy. Instead, co-conspirator Lee Pung Chung, who pleaded guilty before trial, testified against petitioner and identified him as the fourth member of the group. During his testimony, however—and in marked contrast to his performance at the earlier trial of co-conspirator Boon San Chong—Chung began to claim a lack of recollection as to certain facts. When that occurred, the prosecution sought, under Fed. R. Evid. 404(b), to introduce evidence of petitioner's earlier participation in a strikingly similar extortion scheme (5 R. 203-205).

In July 1983, approximately six weeks before the Lee extortion, petitioner and co-defendant Chong met the same two co-conspirators at the Ft. Lauderdale airport, and all four stayed at a local hotel. Several days later, petitioner's three colleagues, carrying weapons, forced their way into the home of the Au family, who owned a nearby Chinese restaurant. The three remained in the house throughout the night. The following morning, one of them accompanied Mrs. Au to her bank, where she withdrew $40,000 and gave it to the men. Hotel records established that, during the period of the extortion, someone with petitioner's name and address was registered at the hotel and that telephone calls were placed between the room in question and co-conspirator Chung's house (5 R. 221-224, 248-249, 318-319; 7 R. 609-612).

The prosecution sought to introduce this extrinsic offense evidence both to establish petitioner's identity as the fourth member of the Lee extortion conspiracy and to confirm that petitioner acted with the necessary criminal intent in joining that scheme. The district court, applying the two-part test set forth in *United States* v. *Beechum*, 582 F.2d 898, 913-915 (5th Cir. 1978) (*en banc*), cert. denied, 440 U.S. 920 (1979), concluded that the evidence was relevant to those issues and that its probative value outweighed its prejudicial impact. Accordingly, the court allowed the introduction of the evidence of the Au extortion and twice instructed the jury as to the limited basis for its admission (5 R. 203-206, 208-215; 7 R. 638-639, 750-751). The court of appeals affirmed petitioner's convictions without opinion in an unpublished judgment order (Pet. App. A1).

3. Petitioner asserts (Pet. 13-24) that the government failed to specify a proper basis for the admission of the extrinsic offense evidence and that as a result the district court admitted the evidence for an improper purpose; namely, to establish that petitioner must have acted in conformity with his earlier behavior.

Anticipating the introduction of the Au extortion evidence during trial, petitioner's counsel argued, even before the prosecution had been called upon to justify its admission, that the evidence could not aid in proving "the issues of motive, intent, or identity" (5 R. 209-210). The district court disagreed. It found that the prosecution had adduced little other evidence to establish petitioner's identity or criminal intent and that its need for the evidence was therefore great. Accordingly, the court concluded that the probative value of the evidence outweighed the risk of undue prejudice (5 R. 204, 214).[2] While it is thus true, as petitioner

---

[2]The court also found that the extrinsic crime and the charged offense were so similar and distinctive that they shared an "identity of the parties [and] identity of the modus operandi" sufficient to admit the

complains (see Pet. 20-22), that the district court evaluated the prosecution's need for the extrinsic offense evidence before authorizing the admission of that evidence, the district court did not do so, as petitioner complains, to "ensur[e] a conviction" (*id.* at 22). Instead, as the Fifth Circuit observed in *Beechum*, "[p]robity * * * must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence * * *. It is the incremental probity of the evidence that is to be balanced against its potential for undue prejudice" (582 F.2d at 914 (citations omitted)). Because petitioner's identity and criminal intent were not conclusively established by other evidence, the "incremental probity" of the extrinsic offense evidence outweighed its potential for undue prejudice. The district court therefore properly admitted that evidence.[3]

In its unelaborated judgment order affirming the district court's decision to admit the extrinsic evidence (Pet. App. 1a), the court of appeals did not create a conflict between

---

evidence to establish petitioner's identity (7 R. 555). See *United States* v. *Myers*, 550 F.2d 1036, 1045 (1977), on remand, 572 F.2d 506 (5th Cir.) cert. denied 439 U.S. 847 (1978) ("The probity of the evidence of other crimes where introduced for this purpose depends upon both the uniqueness of the *modus operandi* and the degree of similarity between the charged crime and the uncharged crime.").

[3]Petitioner is wrong in asserting (Pet. 18) that the extrinsic offense was insufficiently similar to the charged offense to establish his identity as the fourth member of the Lee extortion conspiracy. The offenses were in fact extraordinarily similar in character. Both crimes involved families known to petitioner, both of which owned Chinese restaurants. Both crimes involved the same three co-conspirators, who held their victims at gunpoint in the victims' homes overnight while maintaining contact with a fourth participant (petitioner) who supervised the scheme. And both crimes involved forcing the victims to withdraw sums of money from their banks. In short, the charged and extrinsic crimes were distinctive and virtually identical; by no means can they fairly be described as sharing nothing more than certain "components of extortion in general" (*ibid.*).

the Eleventh Circuit and any other court of appeals. Petitioner suggests (Pet. 19, 24) that the decision in this case conflicts with the Ninth Circuit's decision in *United States* v. *Powell*, 587 F.2d 443 (1978). In *Powell*, the court of appeals concluded that extrinsic offense evidence had improperly been admitted to establish the defendant's intent to commit the charged crime because the issue of intent was not really in dispute in that case. Since there was little or no need for evidence tending to prove intent, the probative value of the extrinsic offense evidence in *Powell* was outweighed by the risk of undue prejudice (587 F.2d at 448). In addition, the court of appeals in *Powell* concluded that the extrinsic offense and the charged crime did not share sufficiently distinctive characteristics to warrant admission of the extrinsic evidence to establish the defendant's identity (*ibid.*). By contrast, the district court in this case concluded that the probative value of the evidence outweighed the risk of prejudice and warranted its admission not only on the disputed issue of petitioner's criminal intent, but also on the issue of identity. There is accordingly no conflict between *Powell* and the instant case.[4]

---

[4]The decision in this case does not conflict with the decision in *United States* v. *Alfonso*, 759 F.2d 728, 739 (9th Cir. 1985), as petitioner suggests (Pet. 23). In *Alfonso*, the court of appeals concluded that extrinsic offense evidence had been improperly admitted at trial because it bore little if any similarity to the charged offense and hence was not probative of the defendant's criminal intent (759 F.2d at 740). Here, by contrast, the extrinsic offense and the charged offense were remarkably similar and the modus operandi of both crimes was distinctive.

Nor does the instant case conflict with *Alfonso* or with *United States* v. *Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982)—as petitioner additionally suggests (Pet. 23)—on the ground that those two decisions impose on the prosecution the responsibility to articulate the basis for the admission of extrinsic offense evidence. Here, as in *Alfonso* and *Mehrmanesh*, the prosecution sought the introduction of certain evidence under Rule 404(b). By so moving, the prosecution was obliged in each case to make clear to the court and opposing counsel "the grounds

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1987

---

upon which [the motion was] made." Fed. R. Crim. P. 47. Here, however, unlike in *Alfonso* or *Mehrmanesh*, the bases for the prosecution's motion were immediately apparent to petitioner's counsel (see 5 R. 209-210), who thereafter was able to argue cogently—albeit unsuccessfully—against the admission of the evidence. The district court in this case accordingly did not permit the introduction of extrinsic offense evidence in a manner contrary to the dictates either of Rule 47 or the decisions in *Alfonso* and *Mehrmanesh*.